Supreme Court, U.S.
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No.

In the Supreme Court of the United States

DENTSPLY INTERNATIONAL, INC.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a manufacturer's exclusive dealing arrangement with some (but not all) distributors of the relevant product violate Section 2 of the Sherman Act, where the arrangement neither impedes nor precludes its rivals from reaching end-user purchasers, and where it has been found to have no probable anticompetitive effects under Section 3 of the Clayton Act?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), Petitioner states that all parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Petitioner states that it has no parent companies and no publicly held company that owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dentsply International, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit's opinion is reported at 399 F.3d 181. (Pet. App. 1a-26a). The district court's opinion is reported at 277 F. Supp. 2d 387. (Pet. App. 27a-145a).

JURISDICTION

The Third Circuit issued its judgment on February 24, 2005, and denied a timely petition for rehearing and rehearing *en banc* on May 17, 2005. (Pet. App. 146a-47a). On July 28, 2005, Justice Souter granted Petitioner's request to extend the time for filing the instant Petition to and including September 14, 2005. Applic. No. 05A103. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Appendix reproduces 15 U.S.C. § 2 and 15 U.S.C. § 14. (Pet. App. 148a).

STATEMENT OF THE CASE

Dentsply International, Inc. ("Dentsply") is the nation's largest manufacturer of professional dental products, including artificial teeth. This case arises out of a United States Department of Justice challenge to Dentsply's Dealer Criterion 6 policy under the federal antitrust laws. Dealer Criterion 6 states that authorized Dentsply tooth dealers may not add competing tooth lines for distribution so long as they are distributing Dentsply teeth. At the time of trial in this case, there were hundreds of tooth dealers in the

United States engaged in and available for the distribution of tooth products. Dentsply's authorized tooth dealers numbered 23.

The government alleged that Dealer Criterion 6 constituted an unlawful exclusive dealing arrangement under Section 1 of the Sherman Act and Section 3 of the Clayton Act, and constituted an unlawful use of monopoly power under Section 2 of the Sherman Act. The trial court ruled against the government and in favor of Dentsply on all counts. It found that Dentsply's rivals can and do sell their competing tooth products to the end-user dental laboratories, both directly and through their own dealer networks, and have at their disposal hundreds of dealers uninvolved with Dentsply. Dealer Criterion 6, therefore, did not foreclose competition from any share of the end-user market for artificial teeth, the trial court determined, nor pose any probable anticompetitive effects. The trial court entered judgment for Dentsply on the Sherman § 1 and Clayton § 3 claims. The trial court also determined that the government had failed to prove that Dealer Criterion 6 produced any actual anticompetitive effects and entered judgment for Dentsply on the Sherman § 2 monopolization claim as well.

The government appealed only the Sherman § 2 determination, arguing that, despite the trial court's unchallenged finding of no *probable* anticompetitive effects under Clayton § 3, there was a sufficient evidentiary basis to conclude that Dealer Criterion 6 had *actual* anticompetitive effects violative of Sherman § 2. For Sherman § 2 purposes, the government maintained, it was enough to show that Dentsply's Dealer Criterion 6 removed from its rivals' use the 23 authorized Dentsply dealers, notwithstanding that hundreds of dealers were found to be readily available to Dentsply's rivals and that direct sales to laboratories were also found to be a viable method for those rivals to do

business. In a decision that cannot be reconciled with this Court's seminal decision in *Tampa Electric v. Nashville Coal Co.*, 365 U.S. 320 (1961), and is in conflict with at least six other circuit courts of appeals, the Third Circuit agreed and reversed the trial court's judgment in favor of Dentsply. Plenary review by this Court is, therefore, needed.

A. Trial Court Proceedings

On January 5, 1999, the government filed a complaint against Dentsply challenging Dealer Criterion 6 under the federal antitrust laws. It was the government's contention that Dentsply's policy that dealers that carry its artificial tooth line may not add competing tooth lines to their product offerings prevented rivals from effectively competing for the tooth business of dental laboratories, the end users of artificial teeth (prior to fabrication of a denture), and therefore violated § 1 and § 2 of the Sherman Act and § 3 of the Clayton Act.

Following a four-week bench trial in 2002, the trial court rejected all of the government's claims, holding that Dentsply's Dealer Criterion 6 did not foreclose competition from any substantial share of the market for artificial teeth, and had neither actual nor probable anticompetitive effects. Critical to the trial court's analysis was its finding that Dentsply's rivals do in fact sell directly to dental labs, as well as through their own dealer networks. There was no dispute at trial—and the government confirmed on appeal—that the relevant line of commerce for prefabricated artificial teeth was properly defined by the end-user sales to dental labs. This view was shared by the trial experts; the government's own economic expert explicitly opined that the labs are the "immediate customers" in the artificial tooth market and conceded that Dentsply's rivals are "not foreclosed from a substantial share of those labs." (Pet. App. 42a (FOF 71)). Similarly, at oral argument in the court

below, the government acknowledged its continuing agreement with Dentsply that the relevant market in which to measure the effect of Dentsply's policy is the sale of artificial teeth to dental labs. (Pet. App. 155a-56a).

At the time of trial, five of the eight "relevant" rival manufacturers were selling teeth directly to dental labs. (Pet. App. 32a, 34a-36a (FOF 27, 40, 43, 45, 47)). The trial court found, and the government agreed, that direct sales are a "viable" method of distribution. (Pet. App. 42a (FOF 71)). One of Dentsply's rivals also conceded that selling directly to labs is an "effective method of distribution" that provides "some advantages" over dealer distribution. (Pet. App. 49a (FOF 99)). In addition, the trial court found that direct-selling manufacturers are just as capable of selling teeth to dental labs as are dealers. (Pet. App. 43a-45a (FOF 75-81)). It further found that manufacturers have replicated or could replicate the dealer function. (Pet. App. 45a-49a (FOF 82-98)).

In addition to the option of selling directly to dental labs, the court found that there are "hundreds" of dental dealers in the United States available to manufacturers other than Dentsply's 23 authorized tooth dealers. (Pet. App. 60a (FOF 140)). In fact, the court noted that all but two of Dentsply's rivals use their own dealer networks to reach the market. (Pet. App. 57a, 59a-60a (FOF 129, 136-39)). Even Dentsply's 23 dealers are available to its rivals. (Pet. App. 137a, 140a, 142a (Law 15, 29, 35)). The trial court found that Dealer Criterion 6 was terminable at will and imposed no continuing obligation on participating dealers to deal only with Dentsply. (Pet. App. 53a (FOF 110-11)). Notably, half of the eight rival manufacturers continue to distribute their teeth through Dentsply's dealers, in addition to selling directly and through their own dealers, and have done so since before Dentsply announced Dealer Criterion 6 in 1993,

and since then. (Pet. App. 34a-35a, 60a, 70a, 133a-34a (FOF 40, 43, 139, 175, 367)).

In response to the government's assertion that Dentsply's market share was the direct result of Dealer Criterion 6, the trial court found otherwise, holding that the evidence showed, instead, that Dentsply's large persistent market share is due to its 100-year history of innovation and its superior promotion and marketing of teeth to labs. In this connection, the court explicitly found that Dentsply has been a leader in the United States market for artificial teeth for nearly a century (Pet. App. 30a, 63a-68a (FOF 15, 148-68)); that throughout its history Dentsply introduced major advancements in the artificial tooth market (Pet. App. 63a-64a (FOF 148-54)); and that Dentsply undertakes enormous efforts to generate demand and promote its products at all levels of the market—the dental lab, dentist and patient. (Pet. App 99a-108a (FOF 269-99)).

By contrast, the small market shares of Dentsply's rivals were found to be due to low product appeal and rivals' failures to market and support their products. Dentsply's two leading rivals—Ivoclar Vivadent AG ("Ivoclar") and Vita Zahnfabrik ("Vita")—were specifically found to have failed to promote their teeth. (Pet. App. 96a-99a (FOF 257-68)). Moreover, throughout most of the relevant period, Vita and Ivoclar produced teeth that used European moulds. European moulds produce teeth that are materially different from teeth created with American moulds, and their use posed significant obstacles to those rivals' ability to increase their U.S. market share. (Pet. App. 93a-95a (FOF 249-56)).

On this record, the trial court concluded that Dentsply's policy did not restrain trade in violation of Sherman § 1, and posed no probable anticompetitive effect under Clayton § 3. The government did not appeal these rulings.